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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/02/06

Commissioner:
Edward McGaffigan, Jr.

SERVED 06/02/06

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.)
)
)
(National Enrichment Facility))

Docket No. 70-3103-ML

**DECISION ON THE MOTION OF
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN FOR DISQUALIFICATION OF COMMISSIONER**

Introduction and Background

In a motion dated May 24, 2006, Intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC), ask that I, Commissioner Edward McGaffigan, Jr., disqualify myself from participation in the above-captioned case and that I consider whether I should disqualify myself in other proceedings involving NIRS as a party.

The bases for NIRS/PC motion are statements I made at a public Commission meeting – BRIEFING ON THE STATUS OF EMERGENCY PLANNING ACTIVITIES – held on May 2, 2006. In a brief exchange during that Commission meeting, I challenged the accuracy of statements (on unmonitored tritium releases from nuclear power plants) made by NIRS representative Paul Gunter and NIRS consultant Dr. Arjun Makhijani¹, made a passing remark² about the qualifications of the NIRS consultant, and criticized NIRS for what I believe to be misleading statements about the potential medical effects of tritium releases. None of my statements at the Commission meeting relates to matters pending in adjudication in the instant proceeding or any other agency adjudication.

As NIRS/PC notes in its motion, a motion for disqualification of a Commissioner is decided by

¹ NIRS/PC indicates that Dr. Makhijani is “the chief witness for NIRS/PC on nuclear issues” in the instant proceeding.

² My remark – that Dr. Makhijani “doesn’t know anything about radiation” – was made in the “heat” of the Commission discussion of emergency planning and tritium releases. It was obvious hyperbole meant to convey my strong view that NIRS’ claim (attributed to Dr. Makhijani) about the health effects of small tritium releases was ill-informed and misleading. My remark by no means reflected a studied assessment of Dr. Makhijani’s qualifications. I do not question the Licensing Board’s finding that Dr. Makhijani is qualified to testify as an expert witness in the current adjudicatory proceeding.

the Commissioner himself. *Joseph J. Macktal*, CLI-89-18, 30 NRC 167, 170 (1989). As discussed in more detail below, I deny NIRS/PC motion.

Discussion

As a Commissioner, I sometimes act in a judicial capacity, as in this proceeding, but more often I act in other capacities – including policy-maker, law-enforcer, educator, and public spokesman. In short, I have both a non-adjudicatory role and an adjudicatory role; these roles are, and must be kept, separate and distinct.

In my non-adjudicatory role, I believe that it is incumbent on me to clearly and publicly state my views on non-adjudicatory matters before the Commission and to, among other things, address (and sometimes rebut) statements and assertions that I believe to be misleading, untrue or a distortion of the facts. I have done so often and repeatedly in the nearly nine and a half years that I have been a Commissioner. For example, I have criticized the Government Accountability Office (GAO) for what I viewed as misleading statements and technically unsupportable assertions:

COMMISSIONER EDWARD MCGAFFIGAN: Mr. Chairman, I have a comment about something that's not exactly the subject of this hearing, but we had a GAO report yesterday on force-on-force exercises that follows another GAO report we got a week or two ago about radiological [dispersal] devices And substantively this report and the previous report woefully reflect on the General Accounting Office in my view.

The previous report, the very first line of it, talks about Iodine 131 as a radionuclide of concern for radiological [dispersal] device. And no self respecting scientist would ever make that claim It's just dumb stuff coming out of GAO.

* * * * *

There's a bunch of other stupid things in here. If the GAO wants to say stupid things, Mr. Chairman, I suggest that we invite the GAO here to say the stupid things across the table from us so that we can rebut them in public³

On many other occasions, I have publicly expressed similar frustrations and criticisms⁴ in my

³ Commission MEETING WITH NUCLEAR REACTOR INDUSTRY ON SECURITY FORCE WORK HOUR LIMITATIONS, September 25, 2003, transcript pp. 4-6.

⁴ See, for example, BRIEFING ON OFFICE OF NUCLEAR MATERIALS SAFETY AND SAFEGUARDS (NMSS) PROGRAMS, PERFORMANCE, AND PLANS (February 14, 2006), tr. at 50 where I stated "We look silly in that area [NRR-NMSS dispute over criticality in spent fuel pools] to be honest with you"; BRIEFING ON OFFICE OF NUCLEAR REACTOR REGULATION (NRR) PROGRAMS, PERFORMANCE, AND PLANS (March 16, 2006), tr. at 48 – "I think we're falling back into that pre-decisional nonsense in protecting information, too many papers coming to the Commission, marked "Commission sensitive," and there isn't a sensitive thing in them." [criticizing the NRC staff for initially withholding papers from the public with a "nonsense" process]; and BRIEFING ON NUCLEAR SECURITY AND INCIDENT RESPONSE (NSIR) PROGRAMS, PERFORMANCE, AND PLANS (March 15, 2006), tr. at 37-38 – ". . . which brings me to the IG, the NRC IG. I just want to – this is not going to be a question here. This is going to be a seven-minute soliloquy, I guess. There is a recent IG report about the National Source

non-adjudicatory role. My intent always is to try to correct what I believe to be misleading assertions and ineffective processes.

In public Commission meetings I tend to speak vigorously, sometimes colorfully, both to spark debate on matters I believe to be important and to make sure my views become known and receive a full airing. This is my personal style. But such meetings are not decisional. They provide information to the Commission and a forum for public discussion. Informal “back-and-forth” among participants is the norm. Off-the-cuff remarks in such a setting are not to be mistaken for the careful analytical work that accompanies formal Commission decision-making.

Although I acknowledge that I am not always circumspect in my manner of “speaking my mind” and that my often aggressive attempts to “correct the record” may appear intemperate when taken out of context, my intent, always, is to accurately state the facts on technical matters as I see them and not to impugn the individuals or organizations involved. I am not biased for or against such individuals and organizations, but seek only to clarify and correct what I believe to be inaccuracies or distortions that may otherwise mislead the public. I feel I best serve the public by speaking out at public meetings forthrightly and, if I think necessary, with strong language.

In my adjudicatory role, I am not the direct trier of fact. I view it as the responsibility of the parties to the adjudication to establish a sound record to address the issues and support their positions, to challenge questionable evidence and to challenge witness qualifications. I rely on the Atomic Safety and Licensing Board’s judgment on the qualifications of witnesses and I rely on the Board to assemble a factual record for decision. In my adjudicatory role, I make a judgment, based on the record and the arguments of the parties, as to whether the Board properly applied rules and precedents in reaching its decision and whether the decision has a

Tracking System that was truly terrible I just want to put on the record that the IG report is absolutely, completely wrong in its assertions about the interim database if the IG continues to turn out terrible reports, I’m going to call him on it. I hope that they don’t influence NRC decision making when they’re as ridiculous as this one is” *See also*, BRIEFING ON RESULTS OF AGENCY ACTION REVIEW MEETING (May 16, 2006), tr. at 70 -71 where I stated “I announced to the public . . . that there were no near misses last year. Greenpeace put out something recently that took our precursor data – and a precursor is a one in one million conditional core damage probability event Now most human beings do not regard one in a million events as near misses, and I think this sort of mining of our data that Greenpeace did in that instance is an outrageous abuse of our data. It’s almost obscene, what they do. They do it simply for the goal of raising unnecessary public fear, which is what their main goal in life is So that’s a statement. None of my colleagues need to associate themselves with it. It is something I do every now and then to just vent and to make sure that the public understands that there were no near misses last year;” and BRIEFING ON STATUS OF RISK-INFORMED, PERFORMANCE-BASED REACTOR REGULATION (May 3, 2006), tr. at 7: “I’m deeply frustrated that more than three decades after WASH-1400 the infrastructure for risk-informed regulation is so, I don’t know, threadbare I was for the mitigating systems performance indicator. . . . I thought it was a good thing because it was going to force people to improve their PRAs, and it did. But I think NEI was honestly embarrassed by the outliers in the industry who kept, you know, that from being – from going into effect as rapidly as we thought it was We are suffering from the half-measures of previous Commissions. . . .”

basis in the record. I am essentially “blind” as to who the parties to the proceeding may be. It’s the record and reasoning that count.

In sum, my criticism of, and challenge to, NIRS at the May 2, 2006 Commission meeting was for the purpose of correcting what I perceived to be inaccuracies or misleading statements on a non-adjudicatory matter having nothing to do with the current litigation. My May 2 comments reflect no prejudgment on any adjudicatory issue in this proceeding. In my non-adjudicatory role, I will continue to challenge and attempt to correct inaccuracies from whatever source as I have done throughout the nearly nine and a half years I have served as a Commissioner. I am not biased for or against NIRS/PC in this or any other adjudicatory proceeding and I will base any decision I am called upon to make in an adjudicatory proceeding on an objective consideration of the evidence in the record and the parties’ arguments.

I don’t believe that a reasonable observer familiar with Commission processes and with the difference between Commissioners’ adjudicatory and non-adjudicatory roles would question my ability to render judicial judgments impartially and fairly.

For these reasons, I deny NIRS/PC’s motion asking me to disqualify myself from participation in this proceeding. I also decline to disqualify myself from participation in other adjudicatory proceedings to which NIRS is a party.

Dated this 2nd Day of June, 2006

/RA/

Edward McGaffigan, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **DECISION ON THE MOTION OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR DISQUALIFICATION OF COMMISSIONER** have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal distribution on or before June 5, 2006.

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[Original signed by Evangeline S. Ngbea]
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Dated at Rockville, Maryland,
this 2nd day of June 2006